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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 891

ANGUS M. MacNEIL,
PETITIONER,

v.

STATE REALTY COMPANY OF BOSTON, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE LAND COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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Blanchard Printing Company, Boston, Mass. — Law Printers

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PETITION FOR A WRIT OF CERTIORARI TO THE LAND COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Angus M. MacNeil, the Petitioner prays that a writ of certiorari issue to review the judgment of the Land Court of the Commonwealth of Massachusetts entered in the case entitled *State Realty Company of Boston, Inc.* v. *Boston Development Corporation*, (197358-197368) on November 6, 1962(?)

Citations to Opinions Below

There was no opinion entered in the Land Court nor in the Supreme Judicial Court in any matter concerned in this petition. That although the full court of the Supreme

Judicial Court of the Commonwealth of Massachusetts was charged with the duty of setting out its reasons for its decisions as required by G. L. (Ter. Ed.) C. 211 Section 8 the said Court in its rescript gave no reasons or opinion for its dismissal of the exceptions and appeal of your petitioner. See App. A for copy of statutes of Massachusetts concerning the requirement of rescripts. Copy of the rescript may be found at R. 75.

Jurisdiction

The judgment of the Land Court was entered on November 6, 1962. R. 92-93 The jurisdiction of this Court in invoked under 28 U.S.C. 1257 (3). The federal questions sought to be reviewed were raised in the Land Court by Answer of Angus M. MacNeil and Counterclaim sought to be filed August 7, 1962 and filed as part of the Application of Angus M. MacNeil to the Court for Directions to the Recorder to Receive and filed Answer and Counterclaim to the Petition R. 59, 62 and also in Motion of Angus M. MacNeil to Vacate Order of February 21, 1962 and to restore this Petition to Trial List after Said Angus M. MacNeil has been given ample opportunity to appear and plead. R. 81 No opportunity was given to your Petitioner to appear or be heard before the Supreme Judicial Court. R. 101.

Questions Presented

1. Whether a state court of the Commonwealth of Massachusetts can disregard the provisions of the United States Constitution and deprive the owner of property located within that State without due process of law and after a court of competent jurisdiction has already determined that the claimant had already been satisfied.

Statutes Involved

The relevant Massachusetts Statutes concerning the performance of the Land Court are set forth in Chapter 185 of the General Laws (Ter. Ed.) which are set forth in Appendix A infra pp. 12-17.

A. Those Statutes involved in the requirements of the Supreme Judicial Court of the Commonwealth of Massachusetts to hear appeals and exceptions from the Land Court and to enter rescripts giving reasons for decisions are also found in Appendix A and are contained in G. L. c. (Ter. Ed.) 211 and 185.

Statement

In 1954, the respondent held a mortgage on certain real estate including the properties subject matter of this petition. The predecessors of your petitioner, in title to said real estate brought a bill in equity in the Superior Court of the Commonwealth of Massachusetts, seeking to redeem from said mortgage. The said court determined the amount due and ordered said amount paid into court in satisfaction of the mortgage debt. (Middlesex Eq. 68671). Said amount was paid into court in accordance with the orders of said Court. The respondent herein claimed an appeal to the Supreme Judicial Court and its decision is reported in 334 Mass. 294. *State Realty Company of Boston, Inc.* v. *MacNeil Bros. Company et als.*

After payment was made into court and on many occasions thereafter, the petitioner herein and his predecessors in title sought to recover possession of said real estate and clear from the record said mortgage. After said rescript and opinion, on February 4, 1958 the Superior Court, sitting for Suffolk and Middlesex Counties determined that the mortgage debt and all claims of the respondent herein

had been satisfied by the payment made into court on December 20, 1954. See Appendix C herein as well as R. 63-68 inc.

Motion was made by the respondent to vacate these 'Findings and Order' of the Superior Court. The motion was heard by Justice Smith of the Superior Court and denied by him on July 12, 1961 and prior thereto, thereby leaving said 'Findings and Order' in full force and effect. R. 58 For a short period in 1958 possession of said property was returned to the predecessors in title of your petitioner. R. 59

The Courts of Massachusetts have permitted the respondent herein to make a bedlam and travesty of the judicial processes of the Commonwealth of Massachusetts. See Appendix C and R. 63-67, especially R. 66-67.

That on May 23, 1955, Boston Development Corporation predecessor in ownership of this real estate brought its petition in the Land Court seeking to have the record of the former mortgage of the respondent herein removed from the record. See docket R. 1 entries through November 23, 1955 and papers R. 8 through 28 inc. Notice is especially called to entries on docket of November 15, 1955 and R. 25-25A ordering the case continued generally. The Petitioner has never been able to obtain from the court an assignment for hearing. The rights of the Petitioner and his predecessors have been defeated in this case by the refusal of the court to hear the case. Thereafter, the respondent herein brought a petition in the Land Court to acquire title to the petitioners property on April 5, 1961. See docket R. 1-2, entries therein April 5, 1961 through June 22, 1961 and papers R. 31-43. The respondent at the time of the pendency of this petition well aware of the Findings and Order shown in App. C herein and R. 63-67 inc. It recognized and admitted that your petitioner is a person at interest in the title to the real estate in this litigation, R.

33 paragraph 4 thereof. An order of notice was taken out and served upon your petitioner herein. The court, however refused to receive and file, the Answer and Response to the said petition and the counterclaim included therein and application for injunction as offered for filing thereby denying to the petitioner herein the right to plead and be heard on the petition of the respondent, although it appeared by the petition itself, the fact that the petitioner was the sole party at interest therein. R. 42 On motion of the respondent herein, without notice or opportunity to be heard being given to the petitioner herein, although he was the sole party at interest, the Land Court ordered the petition dismissed without prejudice. Docket R. 1, 2; entries of April 5, 1961 through June 22, 1961 and docket R. 5 entries of April 5, 1961 through June 22, 1961 and papers R. 31 through R. 43.

Thereafter another petition was filed in the Land Court by the respondent herein versus Boston Development Corporation a dissolved corporation. Docket entries R. 2-4 entries of July 19, 1961 through February 4, 1963 and R. 5-7 in papers R. 44-100 inc.

This petition sought to clear the title of the subject real estate of the interest of your petitioner formerly held by Boston Development Corporation, and all other parties at interest and to establish title to the said real estate in your respondent herein freed of encumbrances of the Hub Finance Co. and all other persons in the world. See App. A for G. L. c. 185 section 70. The fact that Angus M. MacNeil, the petitioner herein was in interest does not appear in said petition specifically although the interest of Hub Finance Company does so appear R. 46. The petition sought to establish the claim, that the respondent herein had held peaceable possession of the subject real estate for three years R. 45 and that a mortgage existed R. 44 Although it knew full well that the Superior Court had ad-

judicated by the 'Findings and Order' of February 4, 1958 that the payment made into court was sufficient to satisfy all lawful claims of the mortgagee against the mortgagor. It further well knew that it was out of possession from middle 1958 through the greater part of October 1959. R. 59.

Said petition was allegedly filed under the provisions of G. L. c. 185 sec. 70, a copy of which will be found in App. A. The right of the petitioner herein to appear and answer appears in G. L. c. 185 sec. 41, copy of which is found in App. A. Section 42 of G. L. c. 185 provides for the entry of general default when no appearance is filed in opposition to a petition. No general default of any kind was entered in this case. No notice of the petition was either addressed to your petitioner herein nor to parties at interest. See R. 49 The sole notice if any, given by the court was to Boston Development Corporation, a dissolved corporation.

That while the Deputy Recorder certifies to having sent a registered mail notice to Boston Development Corporation, no return receipt appears in the record nor does any evidence appear as to whether in fact any notice was actually received by Boston Development Corporation or its successors. However the petitioner became aware of the existence of this petition. No notice was sent to Hub Finance Company, an interested party named in the petition nor to your petitioner herein or to all parties at interest as required by statute. No notice whatever was given to your petitioner under the requirements of the United States Constitution, Amendment XIV, sec. 1.

The Petitioner herein appeared on the return date of the notice and offered to the recorder for filing an appearance and answer and counterclaim in his own behalf. The Recorder refused to receive and file papers tendered for filing. R. 58 Claim of right under the United States Constitution was made therein. Application was made to the

court for directions to the Recorder to receive and file the appearance, answer and counterclaim to the said petition. This application does not appear upon the dockets of this case but the receipt by the recorder is indicated by the file mark on copy of the document R. 62 and allowance of bill of exceptions. R. 50 Rights under the Constitution and Laws of the United States were claimed therein. R. 62 This application was denied without reason being given therefor on the same date, August 7, 1961, the return date of the alleged order of notice.

Appeal and exceptions were taken to the Supreme Judicial Court. R. 68A, and R. 50-51 No judgment had been entered on the petition prior to the entry of these exceptions and appeal in the Supreme Judicial Court. The appeal and exceptions were dismissed by the Supreme Judicial Court without reason being given therefor; on February 5, 1962. See G. L. c. 211 sec. 8 and G. L. c. 185 sec. 15 relevant copies of which are in App. A. Thereafter on February 21, 1962 the Land Court entered a judgment, giving title to the petitioner's property to the respondent herein without prior notice thereof to the petitioner herein R. 78-79 par. 6 et ali. A bill of exceptions and appeal were filed.

Said exceptions were based R. 78-79 again claimed rights under the Fourteenth Amendment to the Constitution of the United States. Your petitioner then filed a motion to vacate the said order (judgment) of February 21, 1962 and to restore the petition to the trial list after your petitioner has been given ample opportunity to appear and be heard. R. 80-82 Again the court denied said motion without setting forth any reason therefore. Appeal and exceptions were taken to this action of the court. R. 87-88 Hearing was held by the Land Court on this motion to vacate the order (judgment) of February 21, 1962. The Court refused to receive any evidence at said hearing. This con-

stituted another denial of due process of law. R. 89 Your petitioner applied to the court to have a stenographer report the hearing R. 89 under the provisions of G. L. c. 185 sec. 13A (App. A). The court denied the request for a stenographer, another denial of due process of law. R. 89-90 Appeal and exceptions were entered in the Supreme Judicial Court. R. 101-103

The respondent herein filed a motion in said Supreme Judicial Court to dismiss the appeal and exceptions of the petitioner herein for the reason that the petitioner was not a party to the Petition or Proceeding. R. 102 No hearing was had on this motion. The motion was granted. R. 101 thereby denying to the petitioner herein the right to be heard as required by G. L. c. 211 sec. 5 (App. A) and further denying to the petitioner herein due process of law as required by Amendment Fourteen of the Constitution of the United States.

A rescript was returned to the Land Court by the Supreme Judicial Court giving no reasons for its decision of dismissal of appeal and exceptions as required by G. L. c. 211 sec. 9 (App. A). No published opinion was made by the reporter of the Supreme Judicial Court as required by G. L. c. 211 sec. 9.

The case was returned to the Land Court which again ordered the issuance of a new certificate of title to the respondent of the petitioner's property without giving any notice or opportunity to be heard in defense of his property. R. 92

No affidavit or verification of facts alleged in the petition of the respondent herein was ever given to the court. R. 4 No hearing upon the merits of the said petition was ever held by the court. See dockets R. 1-7 and docket of the Supreme Judicial Court. R. 101 No notice or opportunity to be heard was ever afforded to the petitioner herein as required by the due process provisions of the United States

Constitution. Consult entire record. No proof of any facts alleged by the respondent herein while in the Land Court or the Supreme Judicial Court was ever made or proof by affidavit, evidence or default or in any other way was ever made. Yet the Land Court entered a judgment which unless it is reversed, on the basis of a claim of mortgage that had been determined against the respondent herein in 1958, by payment made in 1954 satisfying any and all debts due the respondent and without the slightest semblance of due process of law, takes the property of the petitioner herein and gives it to the respondent.

Even the money paid into court in satisfaction of the mortgage has been retained and refused return to the petitioner herein or his predecessors in ownership by the opposition of the respondent. See Appendix C and R. 66 "On December 20, 1954 after a trial on the merits, pursuant to an order by me, the mortgagor deposited with the clerk of the court the sum of $9387.56 'for the benefit of the defendant' State Realty which the mortgagee has refused to take and notwithstanding on various occasions has objected to it being returned to the mortgagor". Again the conduct of the respondent herein has been adjudicated as follows "The bedlam and travesty which has ensued are due almost entirely to the persistent and deliberate unconscionable attempt by said Orlov and Cowin as judgment creditor and as counsel for its creature State Realty to separate the judgment from the security so that the firm could retain the judgment and State Realty the note and mortgage for the full sum of $25,000.00 and interest—"

Reasons for Granting Writ

The decision of the Land Court in the instant case in denying to the petitioner the right to appear and protect and defend his real estate R. 62 is a clear cut violation of the Statutes of Massachusetts but more especially a viola-

tion of the Fourteenth Amendment to the Constitution of the United States.

The Superior Court of Massachusetts, a court of competent jurisdiction had previously adjudicated the satisfaction of the mortgage debt to the respondent, "Findings and Order" app. C and R. 63-67 inc. Therefore the respondent had no rights in the mortgaged property. The action of the Land Court and the Supreme Judicial Court in denying to the petitioner herein all opportunity to appear and defend his property and property rights constitutes a denial of that due process of law guaranteed to every subject of the United States.

The action of the Land Court in entering the judgment shown on R. 76 patently violated the provisions of Amendment XIV sec. 1 of the United States Constitution, by entering said judgment without notice, hearing or proof of facts.

The action of the court in denying the "Motion to vacate the order of February 21, 1962 and to restore this petition to the trial list after Angus M. MacNeil has been given ample opportunity to appear and plead" R. 80-82 is a further denial of the due process clauses of the United States Constitution.

The failure of the Land Court to give adequate notice of pendency of proceedings and giving opportunity to all parties at interest to appear and protect their rights by proper order of notice is still another denial of due process. R. 49

The refusal of the Supreme Judicial Court of the Commonwealth of Massachusetts to give to the petitioner the right to be heard by it on his exceptions and appeals, is a further violation of the Constitutional guarantees of due process of law. Continuously throughout this case the Land Court and the Supreme Judicial Court have denied to the petitioner all notice and opportunity to be heard,

thereby denying all semblance of due process of law while entering a judgment that deprived the petitioner of his real estate. R. 92-93

The deprivation of property without due process of law is all too common in the courts of Massachusetts. It is apparent from the record in this case that relief from such illegal procedure cannot be found by application to the highest court in said State. Application to said court to consider the action of its inferior court, the Land Court, was denied without even a hearing thereon as required by the laws of State and Nation.

The Petitioner is of the opinion that there is no practical way of rectifying the existing conditions without recourse to and assistance from the Supreme Court of the United States.

Clearly, the people of Massachusetts are at the very least entitled to freedom from deprivation of their property without due process of law.

But for any judicial system to order a party to satisfy a mortgage debt by paying the sum determined due into court in satisfaction, then fail to return it upon application, followed by awarding title to the formerly mortgaged property to the satisfied mortgagee is almost incredible in this day and age but true in this case. See *Windsor* v. *McVeigh*, 93 Mass. 274.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Angus M. MacNeil
Petitioner
8630-130th Street
Richmond Hill, N. Y.

Appendix A

G. L. c. 211 sec. 5

Questions of Law to be heard by Full Court—Questions of law arising upon exceptions or report, upon appeal from the Superior Court, upon cases stated or upon special verdicts and all issues in law except as otherwise provided shall be heard and determined by the full court.

G. L. c. 185 sec. 15 excerpt from last part;

Questions of law arising in the Land Court on any decision or decree may be taken by party aggrieved directly to the Supreme Judicial Court for revision in the same manner in which questions of law are taken to that court from the Superior Court.—

G. L. c. 211 sec. 8

The full court as soon as may be after the decision of the questions submitted to it make and enter a proper order direction or judgment or decree for the further disposition of the case or cause a rescript containing a brief statement of the grounds and reasons of the decision to be filed therein or it may by a writ of certiorari or other proper process remove the record of the case or order it to be removed into the Supreme Judicial Court, there enter judgment and remand the record to the Court from which it was removed to carry such judgment into effect or instead thereof the full court may order a new trial or further proceedings at the bar of the Supreme Judicial Court or order sentence to be awarded or execution issued in said court.

G. L. c. 211 sec. 9

Contents of Rescripts—The records and rescripts which are made after the decision of questions of law shall contain a brief statement of the reasons therefore and if no

further opinion is written within sixty days the reporter shall publish the case with the opinion contained in such record or rescript.

G. L. c. 185 sec. 13A

Stenographers.—At the trial of any issue of fact in the land court the presiding judge may appoint a stenographer, who shall be sworn and shall attend the trial, or such part thereof as the judge may direct, and perform like duties and receive the same compensation therefor as a stenographer appointed by the superior court who is not on salary; and the sums so payable for his attendance at court and for any transcript of his notes or part thereof furnished to the judge by his direction shall be paid by the county in which the land in question lies, upon the certificate of the judge. (1924, 157.)

G. L. c. 185 sec. 18

Certification of Decision of Supreme Judicial Court.—The clerk of the supreme judicial court, upon the determination of proceedings pending therein upon appeal or exceptions from the land court, shall certify to the land court the final decision, and the land court shall enter the final decree in the cause, in accordance with the certificate. (1898, 562, § 15; 1899, 131, § 3; R. L. 128, § 14; 1904, 448, § 1.)

G. L. c. 185 sec. 26A

Petitions for Confirmation of Title without Registration.—Petitions for the confirmation of title without registration may be made by the following persons:

First, Persons who claim, singly or collectively, to own a legal estate or easement or right in land held and possessed in fee simple.

Second, Persons who claim, singly or collectively, to have

the power of appointing or disposing of a legal estate or easement or right in land held and possessed in fee simple.

Third, Infants and other persons under disability, by their legally appointed guardians; but the person in whose behalf the petition is made shall be named as petitioner.

Fourth, Corporations, by any officer duly authorized by a vote of the corporation or its governing board. (1931, 457, § 2.)

G. L. c. 185 sec. 27

Filing of Petition; Record of Memorandum.—The petition may be filed with the recorder, or with the assistant recorder at the registry of deeds for any district where the land, or any part thereof, lies. Upon filing his petition, the petitioner shall forthwith cause to be filed in the registry of deeds for each district where any part of the land lies a memorandum stating that the petition for registration has been filed, the date and place of filing, and a copy of the description in the petition of the land or of so much thereof as is within the district. Such memorandum shall be recorded and indexed by the register with the records of deeds. Each assistant recorder shall also keep an index of all petitions in his district, and in every case where the petition is filed with him shall transmit the petition, the papers and plans filed therewith and such memorandum when recorded, to the recorder. (1898, 562, § 20; 1899, 131, § 4; R. L. 128, § 19.)

G. L. c. 185 sec. 41

Answer.—Any person who claims an interest, whether named in the notice or not, may appear and file an answer on or before the return day or within such further time as the court may allow. The answer shall state all objections to the petition, shall set forth the interest claimed by the person who files it, and shall be signed and sworn to by

him or by a person in his behalf. (1898, 562, § 34; R. L. 128, § 33.)

G. L. c. 185 sec. 42

Order of General Default; Effect.—If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, no reason to the contrary appearing, order a general default to be recorded and the petition to be taken for confessed. By the description in the notice, "to all whom it may concern", all the world are made parties defendant and shall be concluded by the default and order. After such default and order, the court may enter a decree confirming the title of the petitioner and ordering registration thereof. The court shall not be bound by the report of the examiner of title, but may require other or further proof. (1898, 562, § 35; R. L. 128, § 34.)

G. L. c. 185 sec. 58

Registration of Encumbrances; Effect.—Every conveyance, lien, attachment, order, decree, instrument or entry affecting registered land, which would under other provisions of law, if recorded, filed or entered in the registry of deeds, affect the land to which it relates, shall, if registered, filed or entered in the office of the assistant recorder of the district where the land to which such instrument relates lies, be notice to all persons from the time of such registering, filing or entering. (1898, 562, § 51; R. L. 128, § 50.)

G. L. c. 185 sec. 70

Foreclosure.—Mortgages of registered land may be foreclosed like mortgages of unregistered land; but in case of foreclosure by entry and possession, the certificate of entry required by section two of chapter two hundred and forty-four shall be filed and registered by an assistant recorder

within thirty days after the entry, in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and has continued for the time required by law to complete the foreclosure, he or his assigns may petition the land court for the entry of a new certificate, and the court, after notice to all parties in interest, shall have jurisdiction to hear the case, and may order the entry of a new certificate on such terms as equity and justice may require.

In case of foreclosure by action as provided in chapter two hundred and forty-four, and by exercising the power of sale in the mortgage under the direction of the court as provided therein, a certified copy of the final decree confirming the sale may, after the time for appeal therefrom has expired, be filed with the assistant recorder, and the purchaser shall thereupon be entitled to the entry of a new certificate.

In case of foreclosure by exercising the power of sale without a previous decree of court, the affidavit required by section fifteen of chapter two hundred and forty-four shall be filed and registered with the assistant recorder, in lieu of recording. The purchaser at the foreclosure sale or his assigns may thereupon at any time present the deed under the power of sale to the assistant recorder for filing and registration, and obtain a new certificate, after the mortgagee's duplicate, if any, has been delivered up and cancelled; but this chapter shall not prevent the mortgagor or other person in interest prior to the entry of a new certificate of title, from directly impeaching, by bill in equity or otherwise, any foreclosure proceedings affecting registered land.

After a new certificate of title has been entered, no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or affect the title to registered land. (1898, 562, § 63; R. L. 128, § 62; 1905, 296, § 1.)

G. L. c. 185 sec. 112

Adverse Claims.—Whoever claims any right or interest in registered land adverse to the registered owner arising after the date of original registration may, if no other provision is made in this chapter for registering the same, make a written statement setting forth fully his alleged right or interest, and how or under whom it was acquired and a reference to the volume and page of the certificate of title of the registered owner, and a description of the land in which the right or interest is claimed. The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place where all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the claim is adjudged to be invalid, the registration shall be cancelled. If the court, after notice and a hearing, finds that a claim thus registered was frivolous or vexatious, it may tax the adverse claimant double costs. (1898, 562, § 106; R. L. 128, § 105.)

G. L. c. 185 sec. 118

Penalty for Fraudulent Conveyance.—Whoever, with intent to defraud, sells and conveys registered land, knowing that an undischarged attachment or any other encumbrance exists thereon not noted by memorandum on the duplicate certificate of title, without informing the grantee of such attachment or other encumbrance before the consideration is paid, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than one year. (1898, 562, § 115; R. L. 128, § 110.)

Appendix B

There were no opinions given in the courts below. The judgment entered in the Land Court is as follows:

COMMONWEALTH OF MASSACHUSETTS
LAND COURT

Cases Nos. 19735-S
19736-S

Upon the petition of State Realty Company of Boston, Inc., a duly existing corporation having an usual place of business in Boston, in the County of Suffolk and said Commonwealth, representing that the land described in petition is set forth in Certificate of Title No. 85155, issued from the Middlesex South Registry District; and that there is noted on said Certificate a mortgage running from MacNeil Bros. Company to Angus M. MacNeil, dated June 29, 1950, registered as Document No. 241582, assigned by said Angus M. MacNeil to Myer L. Orlov by instrument registered as Document No. 243115, and thereafter assigned to Myer L. Orlov et al. under Document No. 283043, and thereafter assigned to the petitioner under Document No. 283044; that the petitioner on July 26, 1954, and July 27, 1954, after a breach of condition of the mortgage, entered and took possession of the land described in said Certificate to foreclose said mortgage as evidenced by Document No. 284618, and after taking possession of the land described in said mortgage continued in possession thereof peaceably for over three years, and is presently in possession of the premises; that the said MacNeil Bros. Company filed a bill in equity in the Superior Court for the County of Middlesex against the petitioner on September 3, 1954, to redeem the land from said mortgage, and a Final Decree after Rescript from the Supreme Judicial Court wherein the bill in equity was dismissed is registered as Document

No. 327200; that by reason of the foregoing, the said mortgage was foreclosed and title to the property described in said Certificate is now in the petitioner; that at the time of said entry and possession and for three years thereafter, no persons having an interest of record were in the military service and entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended; therefore, after two Rescripts from the Supreme Judicial Court, one issued February 5, 1962 dismissing exceptions and appeal of Angus M. MacNeil, and one issued October 15, 1962 dismissing exceptions and appeal of Angus M. MacNeil, it is

ORDERED that at the time of the entry and possession as evidenced by Document No. 284618 and for three years thereafter, no persons having an interest of record were in the military service and entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended; and that Certificate of Title No. 85135 be canceled and that a new certificate be issued to the State Realty Company of Boston, Inc., a duly existing corporation having an usual place of business in Boston, in the County of Suffolk and said Commonwealth, and that said certificate as issued be free of all entries affecting mortgage which is registered as Document No. 241582, and also free of any junior encumbrances.

By the Court.
Attest:

MARGARET M. DALY
Recorder

Dated: November 5, 1962

Appendix C

A conflicting opinion in the Courts of Massachusetts is as found in Suffolk Superior Court Eq. 71043 eq. and other cases therein referred to as follows:

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss: Superior Court
In Equity
No. 68695

STATE REALTY COMPANY OF BOSTON, INC.

v.

MACNEIL BROS. CO. ET ALI

STATE REALTY COMPANY OF BOSTON, INC. No. 71043

v.

ANGUS M. MACNEIL, ET ALI

FINDINGS AND ORDER

By order of the Assignment Session (Macaulay, J.), the following motions were referred to me for hearing:

A motion entitled "Motion for Vacation of Injunctions", filed November 12, 1957, in Suffolk No. 68695 Equity, in which the State Realty Company of Boston, Inc., hereinafter referred to as State Realty, is the plaintiff, and by amendment MacNeil Bros. Company, Angus M. MacNeil, Delmont Corporation, Belknap Corporation, Adrian Corporation, Garden Homes, Inc., Somerville Milling Company, and Shade Slat Corporation of America, Inc. are defendants; and a motion similarly entitled filed November 22, 1957 in Suffolk Equity No. 71043 in which State Realty Company of Boston, Inc. and Myer L. Orlov and Phillip Cowin are plaintiffs and Angus M. MacNeil, MacNeil Bros. Company, Boston Development Corporation and Concord Corporation are defendants. They were heard by me at

length on papers which the parties called to my attention, filed in these cases, and papers filed in Middlesex Superior Court Equity Nos. 18624 and 18671, and the opinion of the Massachusetts Supreme Judicial Court therein, and certain records in United States District Court and United States Court of Appeals in re petition for involuntary bankruptcy against the State Realty Company of Boston, and certain documentary evidence. No oral testimony was introduced.

Both motions seek to vacate the injunctions.

The basic questions are, has the note and mortgage been discharged by payment or other operation of law; and are the defendants entitled to a termination of the injunctions as a matter of law.

From the court papers, documents, and the opinion of the Supreme Judicial Court in volume 334, page 294, the undisputed facts are as follows:

The law firm of Fox, Orlov and Cowin, later Orlov, Cowin and Cohen, and still later Orlov and Cowin, hereinafter called the firm, was engaged to and did render legal services to Angus M. MacNeil. A dispute arose as to the value of the services, and in August 1950 MacNeil assigned to Myer L. Orlov for the benefit of the firm a note and mortgage by the MacNeil Bros. Company to MacNeil for $25,000, as security for the payment of whatever judgment the firm obtained for the legal services. On March 15, 1954, the law firm obtained judgment against MacNeil for $10,079.12. On June 2, 1954, pursuant to written power given by MacNeil, the note and mortgage was sold at public auction to the said law firm for $7,959.40, which sum was thereupon endorsed on the execution as part payment thereof; on June 4, 1954, Orlov assigned the note and mortgage to himself and Cowin and Cohen, his then law partners; on June 28, 1954, the law firm proceeded to and did organize the State Realty Company of Boston, Inc., hereinafter also referred to as the mortgagee, with their three office em-

ployees as incorporators and directors, for the sole purpose of taking title to the note and mortgage, and on June 29, 1954 the mortgage and note was assigned to State Realty by statute form containing the words "assign said mortgage and the note and claim secured thereby".

On August 10, 1954, the State Realty having made a common law entry brought a petition to foreclose under the United States Soldiers' and Sailors' Relief Act, and on September 3, 1954 the mortgagor brought its petition to redeem. These cases were tried before me and were appealed to the Supreme Judicial Court whose decision is reported as aforesaid, holding that the mortgage was security for the judgment and that the sale of the note and mortgage for $7,959.40 was a valid sale.

The mortgagor contends that by virtue of the said Supreme Court decision the amount of the judgment has been reduced by said credit and that the note and mortgage which State Realty holds secures the amount of the judgment less the credit.

On December 20, 1954, after a trial on the merits, pursuant to an order by me, the mortgagor deposited with the Clerk of the Court the sum of $9,387.56 "for the benefit of the defendant" (State Realty); which the mortgagee has refused to take, and notwithstanding, on various occasions, has objected to it being returned to the mortgagor."

From the beginning of negotiations for some form of security for the payment of any judgment the firm might recover against MacNeil, the firm planned and schemed to over-reach undiscerning MacNeil and drew the power of sale document following the context of *Seder* v. *Gould*, 274 Mass. 223, in order to bring the security within the doctrine of that case. And thereafter, up to the decision of the Supreme Court, the firm has continuously and vigorously maintained the position that they were legally en-

titled to $25,000. and interest in accordance with the tenor of the note and mortgage.

The bedlam and travesty which have ensued are due almost entirely to the persistent and deliberate unconscionable, unlawful and inequitable attempt by the said Orlov and Cowin, as judgment creditor and as counsel for its creature State Realty, to separate the judgment from the security so that the firm could retain the judgment and the State Realty the note and mortgage for the full sum of $25,000. and interest.

Since the Supreme Court has decided that the sale at public auction of the note and mortgage was a valid sale, and the then firm as holders so treated it by endorsing the credit of $7,959.40 on the execution, I rule that the money deposited with the Clerk of Court on December 20, 1954 was more than enough to satisfy all the lawful demands of the State Realty which had accrued up to that time.

And, in view of the unconscionable, inequitable and unlawful conduct by Orlov and Cowin, and the dire consequences to MacNeil and the mortgagor resulting therefrom, in equity and good conscience they have forfeited any right to relief from a Court of Equity.

It is ordered that all pending injunctions against MacNeil and his companies in the instant suits, as well as in Middlesex cases Nos. 18624 and 18671, be and they are hereby vacated and terminated.

VINCENT BRODNA
Justice of the Superior Court

February 4, 1958.

Copy [SEAL]

Attest:

(S) FRANCIS B. TYRELL
Asst. Clerk.
August 7, 1961

I hereby state that on August 7, 1961 I presented to Judge Fenton of the Land Court at Boston the Bill of Exceptions filed in cases 19735 S and 19736 S, for allowance.

Subscribed to under the penalties of perjury this seventh day of August 1961 at Boston.

(s) ANGUS M. MACNEIL

telephone number September 11, 1961 thru September 22, 1961 617-Ex 6-0505